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Supreme Court, U.S.
FILED
JUN 1 2001
CLERK

No. 00-1608

IN THE

SUPREME COURT OF THE UNITED STATES

MOUNTAINEER COAL DEVELOPMENT COMPANY, d/b/a Marrowbone Development Company, a West Virginia corporation,
Petitioner,

versus

RADEC, INC., a West Virginia corporation,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

REPLY TO BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Petitioner Mountaineer Coal Development Company, d/b/a Marrowbone Development Company's ("Marrowbone") previously filed corporate disclosure statement appears on page ii of Marrowbone's Petition for Writ of Certiorari To The Supreme Court of Appeals of West Virginia in this case and no further disclosure is required.

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ARGUMENT

1. ANY REVIEW BY THIS COURT OF ANY PUNITIVE DAMAGE AWARD NECESSARILY ENTAILS A REVIEW OF THE FACTS.

Radec argues that Marrowbone's Petition should be denied because, under this Court's Rule 10, such Petitions are "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." This same Rule 10 argument was made by Justice Ginsberg in her dissent in *BMW of N. Am., Inc.* v. *Gore,* 517 U.S. 559, 612, 116 S.Ct. 1589, 1617, 134 L.Ed.2d 809, 849 (1996). However, this argument overlooks the inherently fact-specific nature of Fourteenth Amendment review. In last week's decision in *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.,* 2001 U.S. LEXIS 3520, 69 U.S.L.W. 4299 (May 14, 2001), Justice Stevens, speaking for the majority, noted that, in the Fourteenth Amendment cases in which this Court has examined whether fines or punishments are "grossly excessive", the Court has "engaged in an independent examination of the relevant criteria." Given the "inherently imprecise" constitutional line between what is and is not "grossly excessive" and given the three criteria developed by the majority of the Court in *Gore,* examination of the facts is inescapable. There is no "simple mathematical formula" and issues such as degree of reprehensibility and relationship between penalty and harm can not be assessed in a factual vacuum.

2. THIS COURT IS NOT BOUND BY ANY FINDINGS OF FACT IN THE LOWER COURT BECAUSE NONE WERE MADE.

Radec is wrong in arguing that "the Supreme Court of Appeals of West Virginia made specific factual findings in its opinion that contradicts (sic) Marrowbone's claims."

(Radec Reply at 8). To the contrary, the Supreme Court of Appeals did not make or even purport to make findings of fact. The Court included in its per curiam opinion only a very general summary of its understanding of some of the evidence — based, apparently, on Radec's brief. As Marrowbone pointed out in its Petition for Rehearing, the Supreme Court of Appeals misapprehended and misstated several material facts. *See* Appendix at 102a-104a.[1] The factual inaccuracies, lack of specificity, and lack of references to the record in the lower court's per curiam opinion all strongly support Justice Scott's conclusion that the lower court majority failed to adequately review the facts. *See* Appendix at 22a.

3. PROCEDURAL SAFEGUARDS TO PREVENT "GROSSLY EXCESSIVE" PUNITIVE DAMAGES WERE NOT FOLLOWED IN THIS CASE.

It is undisputed that the procedural safeguards required by *Pacific Mut. Life Ins. Co.* v. *Haslip,* 429 U.S.1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) and *Gore, supra,* were not followed in this case in several respects.

a. Defective jury instructions.

The jury was never told that a punitive damage award must bear a reasonable relationship to actual or compensatory damages. Apparently, as a result of that omission, the jury returned a "grossly excessive" 17 to 1 punitive damage award. *See* Justice Scott's dissent, Appendix at 20a. Radec would have this Court overlook the admitted fundamental deficiency in the jury instructions under a theory of waiver. While it is true that Marrowbone objected to any and all punitive damage instructions because the evidence did not warrant punitive damages under West Virginia law, it is also true that these objections did not cause the trial court to improperly instruct the jury. Rather, the defective instructions were drafted by the trial court and the additional punitive damage instructions initially

tendered by Radec were withdrawn by Radec before Marrowbone's counsel could even finish stating its objection. *See* Radec's Appendix at 7-8.[2] Contrary to Radec's argument and the conclusion of the lower court, Marrowbone's consistent objection to any punitive damage instructions did not constitute "invited error" for several reasons as discussed in Marrowbone's Petition for Rehearing in the lower court. *See* Appendix 95a-101a. In any event, the undisputed constitutional deficiency in the trial court's instructions should have been reviewed under the "plain error doctrine".[3] *See* discussion at Appendix 101a-102a. As Justice Scott pointed out in his dissenting opinion, errors of constitutional magnitude, such as the trial court's failure to instruct the jury as to the need for a reasonable relationship between punitive and compensatory damages, should have triggered a review under the plain error doctrine as recognized in West Virginia. *See* Appendix at 20a.

b. No meaningful and adequate review.

Neither the trial court nor the Supreme Court of Appeals made a "meaningful and adequate review" of the jury's punitive damage award as required by *Pacific Mutual, supra,* including the following inadequacies:

i. The trial court never held a hearing and never took evidence as to the last four of the nine *Garnes'* factors. *See Garnes* v. *Fleming Landfill, Inc.,* 186 W.Va. 656, 413 S.E.2d 897 (1991). Thus, the trial court could not possibly have reviewed all nine of the factors required under *Garnes*. The trial court's Final Order does not even purport to address all nine of the required *Garnes'* elements. *See* Appendix 34a-36a.

ii. The trial court failed to address Syllabus Point 15 of *TXO Prod. Corp.* v. *Alliance Res. Corp.,* 187 W.Va. 457, 419 S.E.2d 870 (1992), aff'd 509 US 443 (1993) in its Final Order. *See* Appendix 23a-40a. That is, no consider-

ation was given to whether the punitive damage award in this action should have been limited to a 5 to 1 ratio vs. compensatory damages, or whether, on the other hand, there was evidence from which a jury could reasonably have found "actual evil intention" which is required to justify a higher ratio under *TXO*.

iii. The trial court violated the *Garnes'* requirement that the trial court "thoroughly set out the reasons for changing [or not changing] the award [punitive damage award]". 413 S.E.2d 897, 910. In lieu of citing either evidence or reasons, the trial court simply recited general and unsupported conclusions which can not be, and which have not been, reviewed on appeal. *See* Appendix 35a-36a.

iv. Although all of the foregoing deficiencies in the trial court's review were carefully pointed out to the Supreme Court of Appeals, that court ultimately did precisely the same thing which the trial court had done, i.e., failed to cite any facts or record references for its generalized rubber-stamp conclusions in support of the punitive damage award. *See* Appendix at 65a-68a. As Justice Scott noted in his dissent:

> "Had the majority of this Court engaged in a thorough and exhaustive review of all aspects of this punitive damage award, as required by *Garnes,* I cannot fathom how it could have justified its decision to affirm." *See* Appendix 22a.

The procedural safeguards put in place in *Garnes,* in response to *Pacific Mutual,* have simply been ignored in practice by the courts of West Virginia.

4. THE PUNITIVE DAMAGE AWARD IN THIS CASE WAS "GROSSLY EXCESSIVE" UNDER THE GUIDEPOSTS IN *GORE*.

a. No evidence of "trickery or deceit".

In arguing to the contrary, Radec cites "facts" which simply are not in the record. There is no evidence in the

record which could fairly be characterized as intentional infliction of economic injury as Radec argues. At best, Radec proved breach of an oral contract, but utterly failed to prove any "trickery", "deceit", or "evil" conduct on the part of Marrowbone. Radec's theory that Marrowbone was motivated by a desire to avoid losing "money to the mineral owner for unmined coal" is not supported by the record. Contrary to Radec's argument, the filing of a permit application for Drautz refutes, rather than supports, Radec's argument that Marrowbone never intended to allow Drautz to be mined.

b. The ratio of punitive damages to "actual harm" was 17 to 1, not 2 to 1.

Radec's argument that the 17 to 1 punitive damage award was not excessive "in light of the actual harm suffered by Radec" is plainly wrong. Although Radec contended at trial that it had suffered various losses, the jury did not credit Radec's arguments. The jury's compensatory damage award included only the $89,629.89 in additional rehabilitation costs incurred by Radec. Thus, the "actual harm" suffered by Radec, as found by the jury, was $89,629.89 and the ratio of punitive damages to "actual harm" was 17 to 1, not 2 to 1.

c. Marrowbone's conduct was not fraudulent, much less criminal.

The most outrageous argument contained in Radec's Brief in Opposition is that "under West Virginia Code §61-3-24(d) (1994), Marrowbone's conduct was criminal." As Radec is well aware, there has never been any criminal investigation of Marrowbone's conduct, there has never been any indictment or suggestion of indictment, and there certainly has been no conviction. Not only was Marrowbone's conduct not criminal, but no one until now has ever contended to the contrary. (Radec makes this argument for the first time in its Brief in Opposition which it just filed

in this Court.) It is true that West Virginia Code §61-3-24 allows prosecution for false promises as to which the state can prove beyond a reasonable doubt that the defendant had a fraudulent intent at the time the promise was made. *See State* v. *Moore,* 166 W.Va. 97, 273 S.E.2d 821 (1980). However, proof of fraudulent intent at the time of the making of a false promise "must be shown by 'something more than mere proof of non-performance or actual falsity.' " 273 S.E.2d 821, 825. The state must prove that the promisor at the time the promise was made had an "intent to cheat, defraud, or deceive." 273 S.E.2d 821, 825. There is no evidence that Marrowbone at any time harbored an "intent to cheat, defraud, or deceive" Radec. Radec deposed every conceivable witness, combed through boxes of Marrowbone documents and never produced a single witness or document at trial proving or even suggesting that Marrowbone engaged in deliberate fraud or had any "intent to cheat, defraud, or deceive." To the contrary, Radec's counsel conceded in his closing argument to the jury that Marrowbone "may have had good intentions." (Trial Transcript, Vol. 5, at p. 7).

[1] References herein to the "Appendix" are references to the Appendix of Marrowbone's Petition for Writ of Certiorari To The Supreme Court of Appeals of West Virginia which was previously filed in this case.

[2] References herein to "Radec's Appendix" are references to the Appendix of Radec's Brief in Opposition which was previously filed in this case.

[3] The "plain error" doctrine has been recognized by a majority of the federal circuits. *See* Moore's Federal Practice §51.21(2).

Respectfully submitted,

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